IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-1550

WILLIAM J. VORBECK, et al.,
Appellants,

vs.

THEODORE D. McNEAL, et al.,
Appellees.

On Appeal from the United States District Court for the
Eastern District of Missouri

JURISDICTIONAL STATEMENT

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INDEX

Cases Cited

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JURISDICTIONAL STATEMENT

PRELIMINARY STATEMENT

This is an appeal from the judgment by a three-judge panel of the United States District Court for the Eastern District of

[1] William J. Vorbeck, Gerald Hanley, Roy Perkins, Donald Strate, James Eichelberger and the St. Louis Police Officers' Association, a not for profit corporation, Appellants.

[2] Theodore D. McNeal, Edward Walsh, George Mehan, Jr., Salees Seddon, John H. Poelker, as the Board of Police Commissioners of the City of St. Louis, Appellees.

Missouri, entered on February 19, 1976, denying injunctive relief and holding that Section 105.510, Revised Statutes of Missouri, which excludes police officers from the bargaining procedures granted to other public employees, has a rational relation to a legitimate objective of the State and does not abridge any constitutional rights of such police officers.

Although the Court declared the Missouri statute unconstitutional insofar as it prohibits police officers from forming and joining labor organizations the Court held that it was not a denial of equal protection to exclude police officers from the limited bargaining procedures provided for other public employees under Section 105.520, R.S.Mo. The Judgment, Memorandum and Opinion of the Three Judge District Court is included herein as Appendix A.[3] This opinion has not yet been officially reported, but has been extensively commented upon in BNA's Government Employee Relations Report, No. 651 p. B-4 (April 5, 1976).

JURISDICTION

This suit was brought under Title 42, U.S.C., Section 1983, and Title 28, U.S.C., Sections 2201 and 2202 seeking to enjoin the enforcement of Sections 105.510 and 105.520, Missouri Revised Statutes, 1969, as being unconstitutional. A Three Judge District Court was convened pursuant to Title 28, U.S.C., Section 2281. The judgment of the Three Judge District Court was entered on February 19, 1976 and Notice of Appeal was filed in that Court on March 16, 1976.

The jurisdiction of the Supreme Court to review this judgment on direct appeal is conferred by Title 28, U.S.C., Section 1253.

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[3] Although this case was heard and submitted simultaneously with a similar suit brought by St. Louis County Police Officers (*Sahm et al. v. Nations et al.*, Cause No. 75-78C(3)) this appeal is taken only by the Appellants named herein in Cause No. 75-77C(3).

The following decisions sustain the jurisdiction of the Supreme Court to review this judgment on direct appeal. *MTM, Inc. v. Baxley*, 720 U.S. 799 (1975); *Florida Lime and Avocado Growers, Inc. v. Jacobsen*, 362 U.S. 73 (1960); *Radio Corporation of America v. United States*, 341 U.S. 412 (1950), affirming 95 F. Supp. 660 (N.D. Ill. 1950).

STATUTES INVOLVED

Sections 105.500-105.530, Missouri Revised Statutes, 1969, as well as Article I, Section 29 of the Missouri Constitution, as amended, are set forth in Appendix B hereto. Briefly summarized, Sections 105.510 and 105.520 grant to public employees generally (but not police officers and teachers) the right to form and join labor organizations and to compel meetings and conferences between their exclusive bargaining representatives and their administrative bodies. Section 105.530, however, withholds the right to strike from all public employees, and the right to strike is not in issue in this case.

QUESTIONS PRESENTED

I. Did the Three Judge District Court err in determining that a Missouri Statute, withholding from police officers, the right granted to other public employees to engage in limited bargaining activities, did not deny the right to equal protection of the law to police officers, and in denying the request of appellants to enjoin appellees from utilizing such statute?

II. Did the Three Judge District Court err in determining that the right of police officers to meet, confer and discuss with their public employer, through their designated representative, proposals relative to salaries and other conditions of em-

ployment, or otherwise collectively negotiate with such public employer, was not of such a fundamental constitutionally protected dimension so as to require a showing of compelling state interest to support the arbitrary classification between police officer and other public employees made by the Missouri Statute?

STATEMENT

The individual plaintiffs who are St. Louis Police Officers employed in and by the City of St. Louis, Missouri, and the St. Louis Police Officers' Association, a not for profit corporation organized and existing under the laws of the State of Missouri, of which the officers are members, brought this action for declaratory and injunctive relief under Title 42, U.S.C. Section 1983 and Title 28, U.S.C. Sections 2201 and 2202. The suit names as defendants the individual members of the Board of Police Commissioners; City of St. Louis. The suit challenged the constitutionality of Sections 105.510 and 105.520, Missouri Revised Statutes, 1969 and certain Personnel Regulations of the Police Department which prohibited officers from joining employee organizations not approved by the Board. The following grounds were asserted:

1. The statute and the Regulations violate the First and Fourteenth Amendments in that they deny to police officers the right to freedom of speech, and assembly and to petition for the redress of grievances and the right to association.

2. The statutory exclusion of police officers violates the Fourteenth Amendment of the United States Constitution in that it creates an unreasonable and arbitrary classification of police officers since other public employees in Missouri have an absolute and statutorily recognized right, (1) to form and join labor organizations, (2) to present proposals to their public

bodies relative to salaries and other conditions of employment through representatives of their own choosing and (3) to compel public bodies to meet, confer and discuss such proposals and to reduce the results of said meetings to writing.[4]

3. The statutory exclusion of police officers violates the Fourteenth Amendment to the United States Constitution in light of Article I Section 29 of the Missouri Constitution which guarantees to all employees of Missouri the right to organize and bargain collectively through representatives of their own choosing in that said statute creates an arbitrary and unreasonable exception to the aforesaid constitutional provision, and constitutes special legislation denying to police officers rights granted to other employees.

As the District Court properly noted there were no material questions of fact and the case was decided on the basis of a stipulation and cross motions for summary judgment.

The appellant police officers and the St. Louis Police Officers Association (hereinafter the Association) wish to designate the Association as a labor organization which would be recognized by the Board of Police Commissioners (hereinafter the Board) as the representative of its police officer members for the purposes of presenting proposals to the Board relative to salary and other conditions of employment. The appellants also wish to meet, confer and discuss these matters with the Board and to reduce the results to writing as provided for in Sections 105.510 and 105.520, Missouri Revised Statutes 1969. Despite a written request indicating that the Association had received authorization cards from over 60% of the department's commissioned employees. The Board adamantly refused to recognize or meet with the designated representatives. Instead the Board issued a bulletin directing the employees' attention to

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[4] As previously noted no public employees in Missouri have the right to strike and the right to strike is not in issue in this case.

department Rule 8.621 which prohibited membership in any organization which was not approved by the Board. The Board warned that any organization which was so approved would remain so, only as long as it did not attempt to function as a labor organization. If it did so it would be removed from the approved list and as an unapproved association, members who were police officers would be subject to suspension, dismissal or other disciplinary action by the Board.

Upon this state of facts, the Court held that Rule 8.621 was an unconstitutional abridgment of freedom of association guaranteed by the First and Fourteenth Amendments to the United States as there was no showing that labor organizations are detrimental to the "sui generis, para-military" nature of police departments. The court further held that since Section 105.510 had been used as in enabling measure for the promulgation of an invalid Rule restricting constitutionally protected rights it was unconstitutional insofar as it prohibited police officers from forming or joining labor organizations.

However, the Court held that the exclusion of police officers from the **mandatory** bargaining procedures created for other public employees by Section 105.520 has a rational relation to a legitimate objective of the state and does not abridge any of appellants' constitutional rights. In addition, the court refused to grant an injunction restraining appellees from enforcing or utilizing Sections 105.510 as a means of excluding appellants from the benefits of Section 105.520.

THE QUESTIONS ARE SUBSTANTIAL

The right of police officers to form and join labor unions and bargain collectively (subject, of course to a limitation on their right to strike) has been a question of mounting national interest. See *Police Officers Guild v. Washington*, 369 F. Supp. 543 (D.D.C. 1973); *Melton v. City of Atlanta*, 324 F. Supp. 315 (N.D. Ga. 1971). The Court below recognized that appellants have a constitutional right to organize or join labor organizations under the associational protections of the First and Fourteenth Amendments to the United States Constitution, but at the same time, held that the exclusion of the appellant police officers by Section 105.510 from the bargaining rights provided to other public employees in Section 105.520 did not violate appellants' constitutional right to equal protection of the law. The Court reasoned that the right to collective bargaining is not a "fundamental constitutional right" and that the exclusion has a rational relation to a legitimate state interest. Assuming, without conceding, that the Court below chose the right test in deciding appellants' Equal Protection claim it is submitted that the Court erred in finding such a rational relation.

It is clear that, in analyzing an Equal Protection claim, courts consider three main elements: the character of the classification in question; the individual interests affected by the classification and the governmental interests asserted in support of the classification *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972); *Dandridge v. Williams*, 397 U.S. 471 (1970); *Shapiro v. Thompson*, 394 U.S. 618 (1969). In the case at bar these three elements may be stated as follows: The character of the classification is policemen viz a viz other public employees in Missouri. The benefit withheld by the classification or the "interest affected" is the right to "present proposals to any public body relative to salaries and other conditions of employment through the representative of their own choosing," (Section 105.510) and the right

to "meet, confer and discuss such proposals" with the public body for the purpose of reducing them to writing to present to an appropriate body for adoption, rejection or modification (Section 105.520). The asserted state interest involved is to maintain a disciplined, unbiased police force for the safety and welfare of the populace.

It is a basic Constitutional rule that for a classification, such as the one created by Section 105.510, to withstand an attack on Equal Protection grounds, it must be clear that there is a rational relation between the withholding of rights granted to others and the asserted state interest involved. *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973); *Dandridge v. Williams*, 397 U.S. 471 (1970); *Kramer v. Union Free School District No. 15*, 395 U.S. 621 (1969).

Appellants contend that under the decision of the District Court in the present case, their position has become somewhat irrational. As one veteran officer phrased it "they let us in the restaurant but they won't let us eat." The court recognized the officer's right to join labor organizations thus giving them equality with all other public employees, then refused to grant them the rights for which the statutory scheme exists. Thus the fundamental right to organize collectively for the purpose of improving their economic situation guaranteed by the First and Fourteenth Amendments to the United States Constitution granted to these appellants by the Court below has been rendered nugatory. This has occurred because of the arbitrary, capricious and irrational classification between police officers and all other public employees in relation to the bargaining provisions of Sections 105.510 and 105.520 which the Court allowed to stand.[5]

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[5] Subsequent to the District Court's decision in the instant case, the Missouri Court of Appeals rendered a decision invalidating an agreement between a Teachers' Association and the Board of Education noting that teachers, (as are police officers) are prohibited from engaging in the bargaining procedures provided in Section 105.520, the Missouri Court of Appeals recognized the District Court's decision and stated:

> [T]he agreement is an attempt to require the submission of individual grievances on matters of compensation and working conditions to mandatory negotiation procedures. To enforce this agreement would allow excluded groups to engage in the modified bargaining procedure allowed other public employees under § 105.510 contrary to the legislative intent. **St. Louis Teachers Association v. Board of Education,** No. 36938 (Mo. App., Mar. 16, 1976) — SW2d —.

Appellees contend there is a legitimate state interest in denying to police officers the rights granted to all other public employees based on *King v. Priest*, 206 S.W.2d 547 (Mo. en banc 1947). *King* recognized that there is a necessity for order, discipline and authority in a police force and held that police are therefore "*sui generis.*" See also *State ex rel. Missey v. City of Cabool*, 441 S.W.2d 35 (Mo. 1969) where the Missouri Supreme Court specifically rejected the contention that the exclusion of police from the benefits of the act created an unconstitutional classification. Appellants recognize that police officers perform functions in furtherance of important public interest, but deny that there is any rational relation between the withholding of the rights here involved and the asserted state interest in maintaining a disciplined police force. There has been no showing or suggestion of how the grant of the rights in question which are enjoyed by all other public employees in Missouri would impair the asserted state interest. To the contrary, it is submitted that the court having recognized the rights of police officers to form and join labor organizations, it is imperative that an orderly process of resolving disputes through conference rather than confrontation be implemented.

How the employee input provided by Sections 105.510 and 105.520 would disrupt the discipline of the Police Department is too vague to have even found expression by the Court below. It seems obvious that the grant of the rights in question would

not hinder but would rather improve morale and discipline within the department. As the situation stands now, the Board refuses, and may indeed be forbidden,[6] to entertain any dialogue with the Association to which a majority of its police officers belong, about anything whatsoever. It is contended that because of the denial of rights involved the asserted state interest is disserved rather than fostered. Discontent without an avenue of communication is indeed a dangerous situation where public safety is concerned. It is difficult to perceive how the denial of the most basic economic rights of police officer employees can be said to insure a disciplined police force.

In a recent case, *University of New Hampshire Chapter of the American Association of University Professors v. Haselton*, 397 F. Supp. 107 (D.N.H. 1975), a Three Judge District Court faced a similar situation regarding the right of university professors to bargain collectively with their State employer. The right was withheld from them by a statute which granted such rights to all other public employees. The Court did not find an equal protection violation in the classification, but based it findings of a rational relation between the classification and the right withheld on grounds which contrast so substantially with those found by the Court below in the case at bar as to be worthy of note. The court in *Haselton* made clear that the general nature of university governance was of such an internal, democratic nature that external collective bargaining might disrupt this democratic balance. In addition, the Court noted that great differences might exist in ability of those involved—university professors—and that collective bargaining might tarnish their professional status and have an adverse effect on those with special ability. 397 F. Supp. *supra* at 110 and 111 and N. 13. Even if it is assumed although it is not conceded that the *Haselton* case correctly rejected the equal protection argument, the differences between *Haselton* and the case at bar are clear, and

[6] See Footnote 5, *supra*.

serve to illustrate what bases are necessary for the finding of a rational relation between a suspect classification and the state interest asserted in support of that classification.

It may well be that appellee's primary concern is the unarticulated fear of a police strike (see Tr. P. 51). Appellants do not in any way assert that they have a right to strike. It must be again noted, however, that the Missouri legislature has specifically withheld the right to strike from the other public employees who are granted bargaining rights under Sections 105.510 and 105.520. Thus all public employees are denied the right to strike in Missouri and could be disciplined if they chose to strike illegally. Consequently, granting to police officers the bargaining rights enjoyed by other public employees, will not increase the possibility of a police strike but may, in fact, provide a viable alternative to that course. The plain fact is that police in Missouri could choose to strike illegally, as could any other public employee, with or without the right to the bargaining procedures provided for by Sections 105.510 and 105.520. However, with such bargaining procedure avenues of communication would at least be opened and resort to an illegal strike could be averted. It is noteworthy in this connection that appellants have not engaged in any type of strike or withholding of services and have chosen to pursue their legal remedies through this action.

For the reasons stated, it is urged by appellants that the District Court erred in finding a rational relation between the arbitrary exclusion of police officers from the operation of the bargaining provisions of Chapter 105 and that appellants were deprived of the equal protection of the law guaranteed to them by the Fourteenth Amendment to the United States Constitution.

Appellants further contend that the Court below erred in determining that the bargaining rights granted to all other public employees by Sections 105.510 and 105.520 Missouri Re-

vised Statutes were not of such a fundamental constitutionally protected nature so as to require the showing of a compelling state need to support such an arbitrary classification as created by Section 105.510.

It is contended by appellants that the right of an employee to compel his employer to listen to him regarding salary and other conditions of employment is constitutionally fundamental. Any other view is a throwback to the laissez-faire capitalism of the 19th century. This right has been recognized for private employees by the enactment of the National Labor Relations Act, Title 29 U.S.C. Sections 151 et seq. See *NLRB v. Jones and Laughlin Steel Co.*, 301 U.S. 1, 33 (1937).

That these rights are of such fundamental character is supported by the decision in *Police Officers Guild v. Washington*, 369 F. Supp. 543 (D.D.C. 1973) wherein the court reasoned:

"The theory that public employment may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected. *Keyistian v. Board of Regents, supra*, 385 U.S. at 605-06; *Illinois State Employees Union v. Lewis*, 473 F. 2d 561, 568 (7th Cir. 1972); *Garrity v. New Jersey*, 385 U.S. 493, 500 (1967); *Muller v. Conlisk*, 429 F. 2d 901, 904 (7th Cir. 1970); *Bruns v. Ponerlean*, 319 F. Supp. 58, 63-64 (D. Md. 1970); *Brukiewa v. Police Comm's*, 257 Md. 36, 263 A. 2d 210 (1970). Police, 'like teachers and lawyers, are not relegated to a watered-down version of constitutional rights. There are rights of a constitutional stature whose exercise a state may not condition by the exertion of a price . . .' *Garrity v. New Jersey*, supra, 385 U.S. at 500 (1967). Among the rights so protected are the right of individuals to associate to further their personal beliefs and, more specifically with respect to the rights asserted by the complaints in this action, the right of public employees to organize collectively and to select

representatives for the purposes of engaging in collective bargaining. *United Federation of Postal Employers v. Blount*, 325 F. Supp. 879, 833 (D.D.C. 1971); *Thomas v. Collins*, 323 U.S. 516, 532-34 (1945); *NLRB v. Jones and Laughlin Steel Co.*, 301 U.S. 1, 33 (1937); *see Hague v. CIO*, 307 U.S. 496 (1939)."

It is conceded that there are several District Court opinions which reach opposite conclusions on the question of public employee collective bargaining rights: *Newport News F.F.A. Local 794 v. City of Newport News*, 339 F. Supp. 1316 (E.D.Va. 1972); *Melton v. City of Atlanta*, 324 F. Supp. 315 (N.D.Ga. 1971); *Atkins v. City of Charlotte*, 296 F. Supp. 1068 (W.D. N. Car. 1969). These cases hold that there is a constitutionally protected right to join a labor organization, but no right to enjoy the natural fruits of joining such an organization, namely the right to bargain collectively.

However, as noted by the three judge panel in *Washington, supra*, other cases seem to imply that among the fundamental rights safeguarded by the First Amendment is "the right to organize collectively and to select representatives for the purpose of engaging in collective bargaining" *United Federation of Postal Clerks v. Blount*, 325 F.Supp. 879, 883 (D.C.D.C. 1971); *Hague v. C.I.O.*, 307 U.S. 496 (1939); *Thomas v. Collins*, 323 U.S 516 (1945). It is urged by appellants that this important question regarding the constitutional rights of public employees should be decided by the Supreme Court in order to obviate the confusion which presently exists.

Appellants believe that this problem is clearly present in the Case at Bar. Appellants have been granted a constitutionally protected right to join labor organizations but this right has been substantially "watered-down" *Garrity v. New Jersey*, 385 U.S. 493, by the simultaneous denial of the rights for which labor unions exist as provided all other public employees by Sections

105.510 and 105.520, to meet with and discuss salaries and other conditions of employment with the representatives of an appropriate public body. This case, therefore, presents an excellant opportunity for this Court to define and clarify the rights of police officers in the public employee labor field.

CONCLUSION

It is submitted, therefore, that the decision of the district court was erroneous in that it denies appellants the rights granted to other public employees of Missouri by Sections 105.510 and 105.520, that neither the "national relation" test nor the "compelling state interest" test permits such a classification and thus the district court's decision denies appellants the equal protection of the laws. Appellants submit that the questions presented are substantial and are of great national importance and that such issues require plenary consideration of the Supreme Court with briefs on the merits and oral arguments for their resolution.

Respectfully submitted,

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APPENDIX

APPENDIX A

In the United States District Court, Eastern District
of Missouri, Eastern Division

No. 75-77 C (3)

William J. Vorbeck, Gerald Haley, Roy Perkins, Donald Strate, James Eichelberger and The St. Louis Police Officers' Association, a Not-for-Profit Corporation,
Plaintiffs,

vs.

Theodore D. McNeal, Edward Walsh, George Mehan, Jr., Salees Seddon, John H. Poelker, as the Board of Police Commissioners of the City of St. Louis,
Defendants.

No. 75-78 C (3)

Gustave W. (Pete) Sahm, President, Dan Hoag, Vice President, Larry Noel, Secretary, and John Easley, Treasurer, Individually and as Officers of the St. Louis County Police Officers Association, Local No. 844, AFL-CIO,
Plaintiffs,

vs.

Gus O. Nations, Chairman, Raymond F. McNally, Jr., Vice Chairman, Earl J. Gates, Secretary, D. Jeff Lance, Member, Individually and as Officers of the St. Louis County Board of Police Commissioners,
Defendants.

JUDGMENT

In accordance with the opinion of this court filed contemporaneously herewith, it is ordered, adjudged, and decreed as follows:

1. that Rule 8.621, as promulgated by the Board of Police Commissioners of the City of St. Louis, is declared unconstitutional on its face;

2. that RS Mo 1969 § 105.510 be and is declared unconstitutional insofar as it prohibits police officers from forming or joining labor organizations;

3. that plaintiffs' request for injunctive relief against the rule and statutes now adjudged to be unconstitutional is denied;

4. that all other declaratory and injunctive relief sought by plaintiffs in these consolidated actions is denied; and

5. that the costs shall be taxed equally between the parties plaintiffs and defendants in each case. No costs shall be taxed against intervenor State of Missouri.

Dated this 19th day of February, 1976.

M. C. MATTHES
Senior Circuit Judge

JAMES H. MEREDITH
Chief District Judge

H. KENNETH WANGELIN
District Judge

In the United States District Court for the
Eastern District of Missouri
Eastern Division

No. 75-77 C (3)

William J. Vorbeck, Gerald Haley, Roy Perkins, Donald Strate, James Eichelberger and The St. Louis Police Officers' Association, a Not-for-Profit Corporation,
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Gus O. Nations, Chairman, Raymond F. McNally, Jr., Vice Chairman, Earl J. Gates, Secretary, D. Jeff Lance, Member, Individually and as Officers of the St. Louis County Board of Police Commissioners,
Defendants.

MEMORANDUM

Before Matthes, Senior Circuit Judge, Meredith, Chief District Judge, and Wangelin, District Judge.

Per Curiam

These two consolidated lawsuits once again raise the constitutionality of the Missouri Public Sector Labor Law, Sections 105.510 through 105.530, R.S. Mo., 1969. The plaintiffs, commissioned police officers of the City of St. Louis, Missouri (No. 75-77 C (3)), and St. Louis County (No. 75-78 C (3)), seek a declaratory judgment and injunctive relief declaring unconstitutional and preventing enforcement of the provisions of the Public Sector Labor Law, particularly Sections 105.510 and 105.520. In addition, the plaintiffs in action No. 75-77 C (3) seek declaratory and injunctive relief regarding Police Board Rule 8.621 promulgated by defendants Theodore D. McNeal, Edward Walsh, George Mehan, Jr., Salees Seddon and John H. Poelker acting pursuant to § 84.170, R.S. Mo., 1969, as the Board of Police Commissioners of the City of St. Louis. Rule 8.621 is a personnel regulation which prohibits commissioned officers from joining unions or other organizations not authorized by the Board.

It is the contention of the plaintiffs that the above cited statutory provisions and Rule 8.621 deny to police officers their rights of freedom of speech and assembly and to petition for redress of grievances, and creates an unreasonable and arbitrary classification between police officers and other public employees, in violation of the First and Fourteenth Amendments to the United States Constitution, and Article I, §§ 9 and 29 of the Missouri Constitution. Jurisdiction is alleged under 28 U.S.C. §§ 1343, 2201-02 and 42 U.S.C. § 1983.

During the pendency of this litigation, the State of Missouri was allowed to intervene as a defendant.

The parties are presently before the Court pursuant to cross-motions for summary judgment. It is clear that there are no material questions of fact, and that the matter is now ready for disposition.

At the outset, it is appropriate to reproduce the statutes that precipitated this litigation. Section 105.510 provides as follows:

> Employees [*except police, deputy sheriffs, Missouri state highway patrolmen, Missouri national guard, all teachers of all Missouri schools, colleges and universities*], of any public body shall have the right to form and join labor organizations and to present proposals to any public body relative to salaries and other conditions of employment through the representative of their own choosing. No such employee shall be discharged or discriminated against because of his exercise of such right, nor shall any person or group of persons, directly or indirectly, by intimidation or coercion, compel or attempt to compel any such employees to join or refrain from joining a labor organization, *except that the above excepted employees have the right to form benevolent, social, or fraternal associations.* (emphasis and brackets added).

Section 105.520 states that

> [w]henever such proposals are presented by the exclusive bargaining representative to a public body, the public body or its designated representative or representatives shall meet, confer and discuss such proposals relative to salaries and other conditions of employment of the employees of the public body with the labor organization which is the exclusive bargaining representative of its employees in a unit appropriate. Upon the completion of discussions, the results shall be reduced to writing and be presented to the appropriate administrative, legislative or other governing body in the form of an ordinance, resolution, bill or other form required for adoption, modification or rejection.

The threshold question in No. 75-78 C is whether the decision in *Fitzgerald v. diGrazia*, 383 F.Supp. 668 (E.D. Mo., 1974) (three-judge court), is dispositive of the present challenge to the constitutionality of Section 105.510 and Section 105.520.

First, defendants contend that principles of res judicata foreclose our consideration of plaintiffs' constitutional claims. In *Fitzgerald*, the court dismissed without prejudice, an action filed by County police officers challenging the constitutionality of Section 105.510 because the facts alleged failed to establish the existence of a case or controversy. Inasmuch as a court's determination that it lacks subject matter jurisdiction is res judicata of the jurisdictional issue only, see *Acree v. Air Line Pilots Ass'n*, 390 F.2d 199, 203 (5th Cir., 1968), the observation of the *Fitzgerald* court as to the merits of plaintiffs' constitutional claims are not controlling.

Secondly, significant to resolution of the case or controversy issue in No. 75-78 C is the fact that Section 105.520 was not under attack in *Fitzgerald*. Judge Regan, writing for the three-judge court in *Fitzgerald*, stressed that the complaint filed there focused exclusively on the Section 105.510[1] restriction on union affiliation. See *Fitzgerald v. diGrazia*, supra at 672. Moreover, we discern important differences between the facts as they existed in *Fitzgerald* and the circumstances that precipitated the present litigation. After *Fitzgerald*, the County Police Officers' Association organized an informational picket line, petitioned the State Board of Mediation, and continued to demand formal private negotiating sessions. On November 13, 1974, attorneys for the County Police Officers' Association sent a written demand to the Chairman of the Board. On November 19, 1974, the Chairman, by letter, summarily rejected the demand.

[1] We agree with the parties that Sections 105.510 and 105.520 should be considered together.

The County Police Officers' Association did all that was possible to obtain recognition as exclusive bargaining agent and to initiate negotiations under the guidelines of Sections 105.510 and 105.520. While the usual way to challenge a statute is to defend against enforcement, Section 105.520, which grants to all public employees, with the exception of police officers, teachers, and certain others, the right to bargain with their public employees, is framed in purely declaratory language and neither authorizes nor compels the imposition of sanctions. Assuming, for jurisdictional purposes only, that plaintiffs' constitutional claims have merit, the very existence of the provision constitutes a present invasion of plaintiffs' rights because it denies them benefits conferred upon others. Cf. *Lake Carriers Ass'n v. MacMullan*, 406 U.S. 498, 507 (1972). Notwithstanding the proscription of Section 105.510 against police forming or joining a labor organization, see *Peters v. Board of Education*, 506 S.W. 2d 429, 432 (Mo., 1974) it stands undisputed that the St. Louis County Police Officers' Association is a member of a union local affiliated with the AFL-CIO. No sanctions have been imposed or threatened because of such membership.[2]

Thus, as in *Fitzgerald v. diGrazia*, supra, 383 F. Supp. 668, we hold that No. 75-78 C presents no case or controversy as to the Section 105.510 prohibition on union affiliation.

We are nonetheless able to reach this question in No. 75-77 C because there the effect of Rule 8.621 and the Board's policy

[2] For a period of time there existed a Code of Discipline and Ethics, promulgated by the St. Louis County Police Board, which had the effect of permitting disciplinary action against a police officer if he attempted to assert his rights guaranteed by the First Amendment to the United States Constitution. Pursuant to the suggestion of the United States District Court that disciplinary regulation was rescinded by the Board. See *Fitzgerald v. diGrazia*, 354 F.Supp. 90, 92 (E.D. Mo., 1972) and *Fitzgerald v. diGrazia*, 360 F.Supp. 485 (E.D. Mo., 1973).

statement of July 11, 1973,[3] which are based in turn on Section 105.510, is to "chill" the exercise of plaintiffs' first amendment freedoms. A stipulation of facts filed by the parties specifies that violation of any Police Department rule may subject an officer to disciplinary action, including suspension and dismissal. It is also significant, for jurisdictional purposes, that the St. Louis Police Officers' Association, unlike its County counterpart, is organized as a benevolent association and remains unaffiliated with a union local.

Turning to the merits, we will first deal with the patently invalid provisions of Rule 8.621, which provide that:

> All members of the department are forbidden to participate without board authorization in the organization of, or to become members of, any association, meeting, union, or any organization of department members other than (organizations including the St. Louis Police Officers' Association are listed), each of which has been duly authorized to perform certain and necessary functions. (parenthetical material added).

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[3] The policy statement reads in pertinent part as follows:

Membership in benevolent, social, or fraternal organizations by police officers is authorized by Section 105.510, R.S. Mo., 1969. That same section, however, prohibits police officers from forming or joining organizations which, in turn, present proposals relative to wages and other conditions of employment in a representative capacity.

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The purpose of this statement is to . . . state with all possible clarity that the Board will not entertain any dialogue relating to wages or working conditions with any "benevolent, social, or fraternal" association, or any officers thereof, acting in a representative capacity for its members. Furthermore, the Board will continue to permit membership in benevolent, social, or fraternal associations as long as such associations exist solely for those purposes. *When and if any such association commences to function in violation of the restrictions imposed by Section 105.510, R.S. Mo., 1969, such organization will be removed from the approved list set forth in Rule 8.621.* (emphasis added).

The defendants in No. 75-77 C (3) contend that Rule 8.621 is constitutional since it has a rational basis for the operation and governing of a municipal police department, citing **King v. Priest,** 206 S.W. 2d 547 (Mo., 1947) (en banc), as authority.

It is apparent that Rule 8.621 is unconstitutional on its face. Even in its narrowest reading, the rule would significantly infringe upon the plaintiffs' First and Fourteenth Amendment rights of freedom of association. There is no compelling reason for denying certain persons membership in organizations solely because of their status as policemen, where there is no showing that the organizations are detrimental to the sui generis, and para-military nature of police departmens. Similar restraints upon the First and Fourteenth Amendment rights of policemen and firemen have been held unconstitutional by other three-judge courts. *Atkins v. City of Charlotte*, 296 F.Supp. 1068 (W.D. N.Car., 1969); *Melton v. City of Atlanta*, 324 F.Supp. 315 (N.D. Ga., 1971); and *Newport News F.F.A. Loc. 794 v. City of Newport News*, 339 F.Supp. 1316 (E.D. Va., 1972).

It is clear that a police officer occupies a special role in society. An officer has a special obligation to protect and preserve the lives of the public. Allowing police to affiliate with a national labor organization clearly raises the spector of a strike against the public interest, c.f. *Atkins v. City of Charlotte*, supra. However, it is also equally clear that "a governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly. . . ." *N.A.A.C.P. v. Alabama, ex rel. Flowers*, 377 U.S. 288, 307 (1964). The appropriate method for protecting the state's legitimate interest in averting such a strike is not to restrict freedom of association, but rather to fashion precise legislation declaring such strikes illegal. *Police Officers' Guild v. Washington*, 369 F.Supp. 543, 553 (D. D.C., 1973) (three-judge court). Such a legislative remedy has already been enacted in Missouri by Section 105.530, R.S. Mo., 1969, which withholds the right to strike from all public employees.

For the foregoing reasons, it is clear that Rule 8.621 exceeds the permissible bounds of the First and Fourteenth Amendments.

It must be made clear, however, that the state may properly prohibit police officers, whether or not union members, from engaging in work slowdowns, strikes, sick-ins, and other related activities. *Lontine v. Van Cleave*, 483 F.2d 966 (10th Cir., 1973); *United States Federation of Postal Clerks v. Blount*, 325 F.Supp. 879 (D.C. D.C., 1971) (three-judge court), *aff'd*, 404 U.S. 802 (1971). The Missouri Legislature has indicated its position with regard to the above proscribed activities by the enactment of Section 105.530. So that there will be no mistake as to our holding, we again emphasize that a public employee's right to exercise certain constitutional freedoms shall not be denied on the basis of an irrational criteria. Those constitutional rights will not provide a shield for actions clearly against the public interest such as a strike of police officers, *c.f. Atkins v. City of Charlotte*, supra, at 1076; *Melton v. City of Atlanta*, supra, at 319-320. The prospect of a city or community being forced to operate without police services would constitute such a "clear and present danger" that such strike activities would not be entitled to constitutional protections. *Thomas v. Collins*, 323 U.S. 516, 529-543 (1944).

Section 105.510 has been used as an enabling measure for a patently invalid restriction upon the constitutional freedoms of citizens, namely Rule 8.621. It has become almost an axiom of law that the prospective chilling of First Amendment rights will give a party standing to challenge an allegedly invalid legislative enactment, *c.f. Long-Shoremen's Union v. Boyd*, 347 U.S. 222 (1947); *Lecci v. Cahn*, 493 F.2d 826 (2nd Cir., 1974); Wright, Miller and Cooper, Federal Practice and Procedure: Jurisdiction § 3532, at 249-53. The fact that Section 105.510 has been used to promulgate invalid rules which restrict constitutional freedoms is clearly an indication that the provisions of that section which prohibit police officers from forming or joining labor organizations exceed the permissible bounds of the First and Fourteenth Amendments. The language of Section 105.510 clearly "sweep[s] unnecessarily broadly . . ." *N.A.A.C.P. v. Alabama, ex rel. Flowers*, supra. As we discussed above, the enactment by the State of Missouri of Section 105.530, R.S. Mo., 1969, is the proper method of restricting illegal activities of public servants with regards to labor disputes. Therefore, we declare that Section 105.510, insofar as it prohibits police officers from forming or joining labor organizations, is unconstitutional.

The exclusion of policemen from the provisions of Section 105.520, which regulates the limited bargaining of public employees in Missouri raises the possibility of an irrational classification in violation of the Fourteenth Amendment. However, since as we have stated, there is no constitutional right to collective bargaining, the issue is whether the classification has a rational relation to a legitimate governmental interest. See *Prostrollo v. University of South Dakota*, 507 F.2d 775, 780 (8th Cir., 1974).

Police officers occupy such a unique place in society that it cannot be said that no rational basis exists for the classification in Section 105.520. *Melton v. City of Atlanta*, supra, at 319. The determination of bargaining procedures for policemen is a decision properly reserved to the Missouri legislature. *Atkins v. City of Charlotte*, supra, at 1077.

In summary we hold and declare as follows:

1. That Rule 8.621 as promulgated by the Board of Police Commissioners of the City of St. Louis is void on its face as an abridgement of freedom of association protected by the First and Fourteenth Amendments of the United States Constitution;

2. That Section 105.510, R.S. Mo., 1969, is unconstitutional insofar as it prohibits police officers from forming or joining labor organizations; and

3. That the Section 105.510 exclusion of police officers from the bargaining procedures enunciated in Section 105.520 has a rational relation to a legitimate objective of the state and does not abridge any of plaintiffs' constitutional rights.

The plaintiffs have asked that the defendants be enjoined from enforcing the rule now adjudged to be unconstitutional. However, since a federal court should issue its injunctive process against state or local officers only in situations of a most compelling necessity, and this Court has no indication that this Court's decision will be ignored by the named individual defendants who comprise the St. Louis City Board of Police Commissioners, this Court will not grant injunctive relief regarding Rule 8.621. *Atkins v. City of Charlotte*, supra, at 1078. Accordingly, the request for injunctive relief will be denied.

Dated this 19 day of February, 1976.

/s/ M. C. Matthes
M. C. Matthes, Senior Circuit Judge

/s/ James H. Meredith
James H. Meredith, Chief District Judge

/s/ H. Kenneth Wangelin
H. Kenneth Wangelin, District Judge

APPENDIX B

MISSOURI CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

Article 1, Section 29—Constitution of the State of Missouri 1945
Organized Labor and Collective Bargaining

That employees shall have the right to organize and to bargain collectively through representatives of their own choosing.

Section 105.500-105.530 Missouri Revised Statutes

LABOR ORGANIZATIONS

105.500. Definitions

Unless the context otherwise requires, the following words and phrases mean:

(1) **"Appropriate unit"** means a unit of employees at any plant or installation or in a craft or in a function of a public body which establishes a clear and identifiable community of interest among the employees concerned;

(2) **"Exclusive bargaining representative"** means an organization which has been designated or selected by majority of employees in an appropriate unit as the representative of such employees in such unit for purposes of collective bargaining;

(3) **"Public body"** means the state of Missouri, or any officer, agency, department, bureau, division, board or commission of the state, or any other political subdivision of or within the state. As amended Laws 1967, p. 192, § 1.

105.510. Certain public employees may join labor organizations and bargain collectively—exceptions—discharge or discrimination for exercise of rights prohibited—allowable organizations for excepted employees

Employees, except police, deputy sheriffs, Missouri state highway patrolmen, Missouri national guard, all teachers of all Missouri schools, colleges and universities, of any public body shall have the right to form and join labor organizations and to present proposals to any public body relative to salaries and other conditions of employment through the representative of their own choosing. No such employee shall be discharged or discriminated against because of his exercise of such right, nor shall any person or group of persons, directly or indirectly, by intimidation or coercion, compel or attempt to compel any such employee to join or refrain from joining a labor organization, except that the above excepted employees have the right to form benevolent, social, or fraternal associations. Membership in such associations may not be restricted on the basis of race, creed, color, religion or ancestry.

Amended by Laws 1967, p. 192, § 1; Laws 1969, p. 186, § 1.

105.520. Public bodies shall confer with labor organizations

Whenever such proposals are presented by the exclusive bargaining representative to a public body, the public body or its designated representative or representatives shall meet, confer and discuss such proposals relative to salaries and other conditions of employment of the employees of the public body with the labor organization which is the exclusive bargaining representative of its employees in a unit appropriate. Upon the completion of discussions, the results shall be reduced to writing and be presented to the appropriate administrative,

legislative or other governing body in the form of an ordinance, resolution, bill or other form required for adoption, modification or rejection. As amended Laws 1967, p. 192, § 1.

105.525 Issues as to appropriate bargaining units and majority representative status to be decided by state board of mediation—appeal to circuit court

Issues with respect to appropriateness of bargaining units and majority representative status shall be resolved by the state board of mediation. In the event that the appropriate administrative body or any of the bargaining units shall be aggrieved by the decision of the state board of mediation, an appeal may be had to the circuit court of the county where the administrative body is located or in the circuit court of Cole county. The state board of mediation shall use the services of the state hearing officer in all contested cases. Added Laws 1967, p. 193, § 1 (§ 105.530).

105.530. Law not to be construed as granting right to strike

Nothing contained in sections 105.500 to 105.530 shall be construed as granting a right to employees covered in sections 105.500 to 105.530 to strike. As amended Laws 1967, p. 193, § 1 (§ 105.540).